With no ruling in the State courts by the summer of 1962, the District Court resumed consideration of the issue, ordered the schools reopened and continued the injunction of tuition grants until the schools were reopened. *Allen* v. *County School Board*, 207 F. Supp. 349 (E.D. Va. July 25, 1962). On appeal this decree was stayed by the Court of Appeals awaiting decision in a case then pending in the Supreme Court of Appeals of Virginia. *Griffin* v. *Board of Supervisors*, 322 F. 2d 332 (4 Cir. 1963). The abstention order was reversed in *Griffin* v. *County School Board*, *supra*, 377 U.S. 218, and the injunction and reopening orders of the District Court approved. Upon receipt of the mandate, the District Court set a hearing for June 17, 1964 to formulate a decree thereon.

This hearing resulted in an order to Prince Edward's Board of Supervisors to appropriate by June 25, 1964, such moneys as were reasonably necessary to open and maintain the public schools on a nondiscriminatory basis, beginning with the 1964 fall term. In obedience the Board arranged to open the public schools, voted appropriations for them and voted also a larger sum for 1964-65 session tuition grants. On June 29, 1964 the plaintiffs moved the District Court to enjoin permanently the processing of tuition grants and to require the Board to augment the sums available for public schools.

With the schools now open, on July 1, 1964 the State Board of Education authorized the reimbursement of persons, to the extent of the tuition grants enjoined for the 1963-64 session, for the amounts they had paid for their children's school attendance in private schools during that session. Thereupon, plaintiffs obtained a temporary injunction barring the payment retroactively of any tuition grants until the hearing on the motion for the permanent injunction, then set for July 9, 1964. The Board agreed to a

permanent injunction of the proposed reimbursement of 1963-64 grants. However, the Court declined to enjoin *future* grants and an appeal was noted on July 17, 1964 to this refusal. On July 28, 1964 the appellants moved this court to accelerate the appeal.

As we were then not in session, the Chief Judge requested the Clerk to ask the Board of Supervisors to stipulate that no tuition grants would be paid pending the appeal. On August 4, 1964 the Clerk transmitted this message to the office of the Attorney General of Virginia. In reply the Clerk was told "during the late evening of August 4," that the Board would not make the stipulation. The next morning the Clerk explained that a satisfactory stipulation would be an agreement that the grants would not be paid before the normal time for processing and paying grants, that is not until after the private schools opened in September 1964.

Meanwhile, during the night of August 4 and early morning of August 5, 1964 the Board met and decided to enlarge substantially the tuition grants for the session 1964-65, and ordered that payment of one-half of the total grants be made before September 1, 1964. That night white parents were notified of the Board's action. Checks totalling about $180,000 were distributed before 9 o'clock A.M. and most of them cashed at that hour, August 5, 1964.

On August 13, 1964 in their appeal, the appellants moved to cite the Board for contempt of this court and for an order restoring the money distributed during the night and morning of August 4-5, 1964. After argument of the appeal in regular course, the District Court was directed to enjoin the Board from paying any tuition grants to send children to private schools so long as these schools remained segregated. *Griffin v. Board of Supervisors*, 339 F.2d 486, 493 (4 Cir. December 2, 1964).

Our decision did not pass upon the contempt motion, but remanded it to the District Court for "further inquiries into the facts surrounding the payments." The District Judge was authorized to consider the charge of the appellants that the defendants had in effect paid 1963-64 grants retrospectively, by authorizing and paying increased amounts for 1964-65, and thus were in contempt of the District Judge's order of July 9, 1964.

Pursuant to the remittitur, the District Court on February 8, 1965 cited the individual members of the Board of Supervisors to show cause, if any, why they should not be held in contempt of the District Court for failure to comply with its injunction of July 9, 1964 against the retroactive payment of the 1963-64 grants. The rule came on for hearing April 23, 1965, at which time all of the parties in interest were present in person and represented by counsel. In addition to the facts heretofore recited, the District Judge made the following undisputed findings in regard to the questioned events of July and August 1964:

> "The Board of Supervisors of Prince Edward County held a meeting on the morning of August 4, 1964 at which time Warren Scott and four of the Negro citizens appeared and filed an unsigned petition bearing ten hundred four typewritten names requesting that the Board of Supervisors allocate additional funds to be used for the purpose of public education. No action was then taken.
>
> "Shortly after adjournment of the Board meeting, Supervisor Jenkins and Supervisor Steck met with a Mr. Taylor and other interested citizens for the purpose of finding a way to pay the '64-'65 tuition grants prior to the time the Court of Appeals could enter an order staying these payments. (It was then known to Mr. Jenkins and to the other members of the group that there had been discussions between Mr. Gray

[counsel for the State Superintendent of Public Instruction] and Mr. Dean [Clerk of the Court of Appeals] in re the possibility of the County agreeing not to make any tuition grant payments during the pendency of the appeal.)

"The Commonwealth Attorney and two other members of the Board of Supervisors were then called. Those assembled agreed that if the Board of Supervisors would increase the tuition grants to $310.00 for high school and $290.00 for elementary school and authorize the immediate payment thereof, this could be done before the Court of Appeals could do anything about it.

"The four Board members and the Commonwealth Attorney then went to the home of the chairman of the Board of Supervisors to advise him of what they had in mind and to determine whether or not a special meeting of the Board of Supervisors could be called the next morning for the purpose of expediting the payment of the '64-'65 tuition grants. The chairman, after being advised by the Board's special counsel* and the Commonwealth Attorney that such a resolution on the part of the Board of Supervisors would be legal, called a special meeting of the Board for 8:00 a.m. August 5th. At that meeting the Board passed the resolution which provided that the grants should be paid half on or before September 1, 1964 and half on or before January 1, 1965.

"In the interim, that is, between the meeting at Chairman Vaughan's house and eight o'clock the next morning, Board Member Jenkins and other members of the citizens' committee made arrangements to telephone the parents of the children then attending the Prince Edward School Foundation schools advising them if they came down that night and made application they could get half the tuition money that morning.

"Some twenty or thirty volunteers assisted the secretary of the Board in processing the applications and

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* The appellants note in their brief that Mr. Gravatt, the Special Counsel for the Board, in fact requested the Board not to pay the grants.

making out the necessary checks. County bonds were sold in Richmond the next morning to raise the money necessary for the payment of these checks.

"Twelve hundred seventeen tuition grant applications were filed during the night of August 4-5. All of these applications were for the '64-'65 school year. Each applicant was paid one-half of the amount applied for. Most, if not all, of the applicants were children enrolled in the Prince Edward School Foundation schools for the year '64-'65.

"There being no evidence that the money thus paid covered school years prior to '64-'65, the Court concludes that the payments made August 4-5, 1964 were not violative of the order entered herein July 9, 1964. The show cause order issued against the members of the Board of Supervisors February 8, 1965 will be dismissed, and it is So ORDERED."

That these acts of the Board of Supervisors constituted a contempt of this court is beyond cavil. The Board undertook to put the money then available for tuition grants—and then wholly subject to its orders—beyond its control as well as that of the court. In doing so the Board took upon itself to decide its right to exercise, in favor of the private school, the Board's general power to appropriate public funds. This use of power was, as the Board was acutely aware, an arrogation of this court's responsibility. Obviously, the aim was to thwart the impact of any adverse decree which might ultimately be forthcoming on the appeal. In effect it was a "resistance to its [this court's] lawful writ, process, order, rule, decree, or command." 18 USC 401(3). The authorities are quite clear on the point.

The Board would escape the judgment of contempt on the argument that the statute limits the power of the court to violations of orders or decrees then extant. But precedent does not so contract the statute or constrict its intent. Although this court had not issued an injunction against the

appropriation of the moneys to tuition grants, the Board knew that if the plaintiffs succeeded this would be its ultimate decree, as in fact it became. That potential decree was thus then within the statute. Furthermore, the appeal was itself a "process" which was alive at the time of the disbursement and was resisted by the disbursement.

In *Merrimack River Savings Bank* v. *Clay Center,* 219 U.S. 527 (1911), a temporary injunction had been issued by a Federal District Court to prevent the destruction by a municipality of a public utility's poles and wires, located in the city streets under an authorized franchise. The suit was dismissed on jurisdictional grounds. However, for and during an appeal to the Supreme Court, the injunction was continued in force. On this review the dismissal was upheld. But before the mandate of dismissal had been issued or could issue, and in the period allowed for presenting an application for a rehearing, the city cut down the poles, destroyed a large section of the wires and thus put the utility out of business. This conduct was declared to be contempt of the Supreme Court, Justice Lurton saying at 535-536:

> "It does not necessarily follow that disobedience of such an injunction, intended only to preserve the status quo pending an appeal, may not be regarded as a contempt of the appellate jurisdiction of this court, which might be rendered nugatory by conduct calculated to remove the subject-matter of the appeal beyond its control, or by its destruction. This we need not decide, since *irrespective of any such injunction actually issued the willful removal beyond reach of the court of the subject-matter of the litigation . . .* [on] *appeal . . . is, in and of itself, a contempt of the appellate jurisdiction of this court. . . .* Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of the suit to prevent." (Accent added.)

The contempt power declared in the *Merrimack* case was not suggested to be rooted in the inherent power of the Supreme Court rather than in the statute now embodied in 18 USC 401(3). Incidentally, the Court has never excluded itself from the statute. Cf. Ex parte Robinson, 86 U.S. 505, 509 (1873). But *Merrimack* is not now cited to power. It is cited as warranting our finding that the putting of the subject-matter of this litigation beyond our reach was a defiance of this court, an anticipatory resistance to its ultimate orders or process.

That inferior courts have the same contempt power as the Supreme Court exerted in *Merrimack,* and that similar conduct is contempt of the lower courts, were unequivocally enunciated in *Lamb* v. *Cramer,* 285 U.S. 217, 219 (1932). There, as in the case now on review, no injunction or order had been issued restraining disposition of the property in suit. Nevertheless, receipt and possession of a part of the res, pendente lite, by a transferee of the defendant-owner was adjudged a contempt of the trial court. The Court had no difficulty in concluding that there was contempt despite the absence of a current restraining order.

While *Lamb* v. *Cramer, supra,* did not specifically mention the statute, the Court obviously did not think it barred prosecution of the transferee for contempt. Essentially, the Court followed the statutory terms—"resistance to its [the court's] lawful writ, process, order, rule, decree, or command"—by not limiting its application to an immediately outstanding precept. The anticipated final judgment was not considered to be presently beyond the contemplation of the statute. Indeed, the contrary is implicit in the opinion. The diversion of the res was held to be contumacious because it "tended to defeat any *decree* which the court *might ultimately* make in the cause." (Accent added.)

Civil and not criminal contempt was the gravamen of *Lamb* v. *Cramer* and is here too. This was a predominant

consideration of the Supreme Court and probably accounts for no advertence to the contempt statute, which seems worded more appropriately for criminal contempt. The omission means nothing, for the primary reasoning of the Court was that the res was in gremio legis and the conveyance of it in part was a disturbance of the constructive possession of the trial court. Whether the decision in *Lamb* v. *Cramer* was founded on this conception of judicial custody or on the statute, of which the Court was hardly unaware, is immaterial. Either ground supports our holding that the Board of Supervisors was in contempt.

The present case is quite different factually from *Berry* v. *Midtown Service Corp.*, 104 F.2d 107 (2 Cir. 1939), relied upon by the Board. There the subject-matter disposed of pending appeal was the leviable assets of the judgment debtor-appellant. The Court distinguished that case from ours when it said that the appeal was not "defeated or impaired" by the defendant's assignment. Further distinction is found in its observation that the suit "was not concerned with any specific property," the judgment on appeal merely establishing a general, personal, financial liability.

In our case the disbursement of the moneys seriously impaired the appeal. The suit and the appeal were directed to a specific subject, the Board's right to apply to a certain purpose moneys within its power. The Board assumed the right in utter and wilful disregard of this court's views. As was said in *Merrimack River Savings Bank* v. *Clay Center, supra,* 219 U.S. 527, 535, and again in *Lamb* v. *Cramer, supra,* 285 U.S. 217, such conduct constituted contempt although not formally and explicitly under injunction.

We find the Board of Supervisors and its members guilty of civil contempt. Accordingly, the Board and its constituent individuals, namely, W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., personally and in their own right, will be ordered

jointly and severally to restore to the County Treasurer of Prince Edward County, through recapture or otherwise, an amount equal to the disbursements authorized and made by their resolutions of August 4-5, 1964. This cause will be continued for a period of 90 days from this date for report by the Board and its members of what has been done towards compliance with this order, as well as for the passage of such further orders as may appear proper.

Another matter on this appeal is the amount allowed appellants' counsel as fees for their services in litigation leading to the reopening of the public schools of Prince Edward County. The District Court fixed the fee at $7,500 and directed that it be paid in the proportions of 50% by the Board of Supervisors of Prince Edward County, 25% by the County School Board and 25% by the State Board of Education. The amount of an allowance of this kind is within the discretion of the District Court, and we would not feel warranted in reviewing it save for a misapprehension of the Court in arriving at its figure.

The District Judge stated that he would not award a larger amount because counsel had not followed the Court's suggestion to seek a ruling by the Supreme Court of Appeals of Virginia upon the basic question of whether the County had the right to abandon public schools to avoid the "racial discrimination prohibited by the Fourteenth Amendment." *Brown* v. *Board of Education,* 347 U.S. 483 (1954). On the assurance of counsel that such a suit would be filed, the District Court abstained, as we have noted ante, for a year from itself passing on the issue. But the question was not submitted to the Virginia court. Indeed, in the suit which they did institute in the State court, the petitioners, appellants here, disavowed the existence of any Federal question at all. *Griffin* v. *Board of Supervisors,* 203 Va. 321, 124 S.E.2d 227 (1962); *Allen* v. *County School Board, supra,* 207 F. Supp. 349, 350.

In their request for allowances, counsel did not include their services or their expenses in the State action. The reason for not tendering the Federal question to the State court, they now say, was that they believed a review on certiorari to the United States Supreme Court, should the State court's determination be unfavorable, would not be "an adequate substitute" for a District Court decision with permissible appeals. Cf. *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 416 (1964). We cannot think that counsel had this different course in mind when they assured the District Court of their intention to pursue their remedies in the State tribunal.

The omission was quite understandably disturbing to the District Judge. However, in the circumstances we do not think counsel should have been penalized by diminution of the award to them. Consequently, we will ask the District Judge to reappraise the value of the legal services without consideration of the reduction factor just discussed. Whatever the ultimate award, we think it ought to be assessed jointly and severally against all defendants, with leave to them to make such division of liability inter se as they deem equitable.

Order accordingly.

II

Dissenting Opinion of the United States Court of Appeals for the Fourth Circuit, dated June 20, 1966

With whom Boreman, Circuit Judge, joins, HAYNSWORTH, Chief Judge, dissenting:

I find no fault with the decision of my brothers concerning the award of fees for counsel, and I am not in disagreement that the conduct of the Supervisors was unconscionable. However, I must disagree with the majority in their

interpretation of the power of this Court to adjudge parties in contempt.

It is clear that this Court has an inherent power to punish contempts. It was originally defined by the seventeenth section of the Judiciary Act of 1789 as the power to punish by fine or imprisonment all contempts of authority in any cause or hearing before the Court. But the power has since been limited and redefined by the Act of Congress of March 2, 1831, now 18 USC § 401. The statute prescribes:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Considerable doubt was expressed in Ex parte Robinson, 86 U.S. 505, as to whether this statute could limit the contempt power of the Supreme Court, which derives its existence and powers from the Constitution, and it is obvious from *Merrimack*[1] that the Court has since gone beyond the statute. But *Robinson*[2] made it clear that there can be no question about the limiting effect the statute has upon the courts of appeals and the district courts. As courts created, not by the Constitution, but, through the power that document vested in Congress, exercise of their inherent contempt powers must be confined to the bounds that Congress has fixed.

Measuring the facts in the present case by the word of

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[1] Merrimack River Savings Bank v. Clay Center, 219 U.S. 527.

[2] Ex parte Robinson, 86 U.S. 505.

Congress, I am unable to find a basis in the statute for a contempt citation here. Phrases (1) and (2) of the statute are not applicable here. The majority finds, under phrase (3), that there was disobedience or resistance to a lawful writ, process, order, rule, decree, or command of this Court. Yet none in fact existed to be disobeyed or resisted. The plaintiffs sought no temporary restraining order or injunction, and none was issued preventing the action taken by the Supervisors. The stipulation requested of the defendants by this court cannot be expanded to fit into any of the things specified in § 401 (3).

The word "process," as used in the statute in its context of writs, orders and decrees, obviously means more than the pendency of an appeal or of some other relevant judicial proceeding. It has been traditionally used to encompass such things as a summons, a subpoena, an attachment, a warrant, a mandate, a levy and, generically, other writs and orders. In the context of other orders and writs, "process" can reasonably be understood to mean no more than the sum of more explicit terms, such as "original process," "summary process," "mesne process" and "final process," all of which clearly refer to papers issuing from the court and embodying its commands or judgments, or notice of them. Construed so expansively as the majority's suggestion of equivalence with the pendency of any relevant judicial proceeding, it would entirely contravene the clearly limiting purpose of the congressional act.

Since the suggested construction of the word "process," as used in the statute, is original with the majority, it has never been treated in any reported opinion. The suggestion is inconsistent with the substantially uniform course of decision, however, while the primary theory of the majority is explicitly at odds with the precedents in this and other courts.

This court declared itself in Ex parte Buskirk, 4 Cir., 72 Fed. 14. There it was held not only that an anticipatory, partial avoidance of a potential decree was not a punishable contempt within the confines of the limiting statute; violation of a stipulation made in open court, without which mesne process might, and probably would, have issued, was held not to be. Implicit in the decision is a narrow, literal reading of the word "process."

Buskirk was a party in a judicial proceeding in a district court for a determination of the ownership of a tract of timber. In open court, he entered into a stipulation that none of the timber would be cut until the court had decided the question of ownership. Nevertheless, pending the court's decision, he began cutting the timber and intentionally removed it beyond the reach of the court. This court held, because of the statute, "however reprehensible such conduct * * * may have been * * * it nevertheless did not constitute a contempt to the court or its orders."

My brothers now overrule *Buskirk* without deigning to mention it.

Our own decision in *Buskirk* is not an aberration. It is the exemplar of uniform decision. Four of our sister circuits have embraced the same construction of the statute, and have done so in no uncertain terms.[3] No court of appeals, until now, has toyed with any other reading.

I cannot dismiss all of these holdings on the basis of an asserted distinction of the Second Circuit's decision in *Berry*. The basis of the asserted distinction of *Berry* was not present in the Second Circuit's earlier *Probst* decision, upon which

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[3] Parker v. United States, 1 Cir., 126 F.2d 370, 380; In re Probst, 2 Cir., 205 Fed. 512; Berry v. Midtown Service Corp., 2 Cir., 104 F.2d 107; In re Sixth & Wisconsin Tower, 7 Cir., 108 F.2d 538; Dakota Corp. v. Slope County, 8 Cir., 75 F.2d 584; and see United States v. Day, C.C.N.J., 6 Am. L. Reg. 632, 25 Fed. Cas. No. 14,934; In re Rice, C.C. Ala., 181 Fed. 217.

Berry depended, or in our decision in *Buskirk* or in those of the First, Seventh and Eighth Circuits.

The holding in *Lamb* v. *Cramer,* 285 U.S. 217, is of some comfort to the majority, but I find myself unable to accept it as an authoritative interpretation of a statute which the Supreme Court and the lower courts did not even mention.

Lamb was a lawyer, who, assertedly in payment of accrued legal fees, accepted a transfer of some of the property in litigation, upon which the adverse parties had specific liens. Concurrently, a supplemental bill in equity to require his restoration of the property to the custody of the court was filed and a rule issued against Lamb to show cause why he should not return the property to the custody of the court or be held in contempt. Lamb claimed immunity from service, and the district court upheld him in both cases. In both cases, the Court of Appeals for the Fifth Circuit reversed, holding that service upon Lamb was good, and that the supplemental bill in equity and the citation were each appropriate means to require restoration of the property to the control of the court, and that each means might be pursued concurrently.[4] Lamb appealed both cases to the Supreme Court, which affirmed the Fifth Circuit in each.[5]

Clearly, the only purpose of the citation in *Lamb* was the procurement of the return of property in the actual possession and under the control of the attorney, an officer of the court. It was not to punish him or to compel him to replace out of his own funds dissipated assets or money. The most significant thing about the *Lamb* cases, however, is that attention in both the Court of Appeals for the Fifth Cir-

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[4] Schmitt v. Lamb, 5 Cir., 48 F.2d 533 (the case arising from the supplemental bill in equity), and Cramer v. Lamb, 5 Cir., 48 F.2d 537 (the case arising upon the citation).

[5] Lamb v. Cramer, 285 U.S. 217 (the case arising on the citation) and Lamb v. Schmitt, Receiver, 285 U.S. 222 (the case arising upon the supplemental bill in equity).

cuit and the Supreme Court was focused upon a very different problem. In neither court was there a citation of the statute with which we are concerned or of the cases which had established a uniform interpretation of it. The Supreme Court wrote in *Lamb* v. *Cramer* as if the affront had been to itself. One can only suppose that it did so because the statute had not been called to its attention,[6] for the Supreme Court had made it perfectly clear in *Robinson*[7] that the subordinate, statutory federal courts are subject to the statute, and that their powers to punish contempts are effectively limited by it.

If the holding in Lamb may be regarded as an interpretation of the unmentioned statute, one may more reasonably conclude that it was an application of § 401 (2) rather than § 401 (3) with which, alone, we are concerned.[8]

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[6] It was of little moment in any event, for clearly the court had the power to compel the attorney to restore the property which he had taken with notice not only of the pendency of the proceeding, but with notice as well of the specific liens held by the adverse parties.

[7] Ex parte Robinson, 86 U.S. 505.

[8] It may be that Lamb did not seek protection of the statute because of ignorance of it. More probably, he did not because he thought the court's authority sufficiently clear under § 401 (2) to warrant his concentration of his defense in an attack upon the service of process. In either event, since, under the plain holdings of the relevant authorities at that time, the contempt proceeding was not arguably authorized by § 401 (3), but probably was authorized by § 401 (2), the Supreme Court's opinion, with no reference to either, cannot be construed as an authoritative construction of § 401 (3). There are too many reasonable explanations of the Supreme Court's action in that case to permit acceptance of the least likely and the most attenuated.

Twenty-four years after Lamb's case was decided, the Supreme Court held that an enrolled attorney was not an officer of the court within the meaning of § 401 (2), Cammer v. U.S., 350 U.S. 399, but that was not the prevailing notion when Lamb sought to retain the fruits of his malfeasance. See e.g. Ex parte Bradley, 74 U.S. 364, 374; Tanner v. U.S., 10 Cir., 62 Fed. 601; Ex parte Davis, C.C. Fla., 112 Fed. 139. If the explanation of Lamb's failure, and that of the courts which decided his case, to deal with the statute does not lie in an absence of awareness of it, speculation about the reason for ignoring it must be against a background of the law as it was understood at the time.

The large issue in thise case was the constitutionality of a continuing program of disbursement of tuition grants allegedly for the purpose of continued maintenance of segregated school systems. The payment of such tuition grants for one-half year did not abort the appeal or frustrate adjudication of the large issue. It was an unwarranted disbursement of public funds, but the Supervisors, themselves, are not now in possession of any part of those moneys. They are not officers of this court punishable under § 401 (2) for official transgressions. What is attempted here is far from what was accomplished in *Lamb* v. *Cramer,* and, to me, is inconsistent with an appropriate deference to an explicit congressional command of unquestioned constitutionality which limits our jurisdiction and authority.

I would not quibble with the majority's finding of fact that the conduct of the Supervisors was contemptible, but I do dissent from their conclusion that it was contemptuous and punishable as such, when the conclusion is dependent upon a reading of the statute which relegates it to meaninglessness. Such an unsympathetic construction is particularly inappropriate when the statute was clearly intended to inhibit our authority, has been declared by the Supreme Court to have that effect and has been uniformly construed by the courts of appeals in accordance with that evident intention. Such a statute limiting the jurisdiction of the federal courts is largely enforceable only by the limited courts, themselves. Above all other statutory commands, courts should be scrupulous to conform themselves to jurisdictional statutes, so that they do not appropriate to themselves powers which have been constitutionally withdrawn from them. If we exceed our authority, if we exercise powers we do not possess, the Supreme Court may correct us, but with the swelling volume of demand upon that court, the congressional scheme can be effectively and promptly implemented only

if the lower courts take great care to move only within the lawful boundaries of their authority.

Respectfully, I dissent from the conclusion that the Supervisors be held in contempt.

III

Judgment Order of the United States Court of Appeals for the Fourth Circuit, dated June 20, 1966

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the Board of Supervisors of Prince Edward County and the members thereof be, and they are hereby, held guilty of civil contempt; and that the said Board and its constituent members, namely, W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., personally and in their own right, be, and they are hereby, ordered jointly and severally to restore to the County Treasurer of Prince Edward County, through recapture or otherwise, an amount equal to the disbursements authorized and made by their resolutions of August 4-5, 1964.

Further ordered that this cause be continued for a period of 90 days from this date for report by the Board and its members of what has been done towards compliance with this order, as well as for the passage of such further orders as may appear proper.

As to the amount allowed appellants' counsel as fees for their services in litigation leading to the reopening of the public schools of Prince Edward County, it is ordered that the United States District Court for the Eastern District of Virginia, reappraise the value of the legal services without

consideration of the reduction factor, consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF
United States Circuit Judge

ALBERT V. BRYAN
United States Circuit Judge

J. S. BELL
United States Circuit Judge

We dissent in part;

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

HERBERT S. BOREMAN
United States Circuit Judge

FILED
June 20, 1966

IV

Stay Order of the United States Court of Appeals for the Fourth Circuit, dated June 20, 1966

Upon the petition of the appellees by their counsel, and for cause shown,

It is ordered that the execution of the order entered by this Court on June 20, 1966, insofar as it requires the defendants to make restitution of the monies therein mentioned, be, and it is hereby, stayed pending application of the appellees to the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the Supreme Court

within the time provided by law, but in all other respects the said order shall remain in full force and effect.

ALBERT V. BRYAN
United States Circuit Judge

FILED
July 29, 1966

V

Mandate of the Supreme Court of the United States

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Fourth Circuit, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that the judgment of the United States District Court for the Eastern District of Virginia be, and the same is hereby, affirmed.

IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools, and that, if it becomes necessary to add new parties to accomplish this end, the District Court is free to do so.

And it is further ordered that the said petitioners, Cocheyse J. Griffin, etc., et al., recover from the County School Board of Prince Edward County, et al. Nine Hundred and Forty-three Dollars and Four Cents ($943.04) for their costs herein expended.

May 25, 1964

VI

Order on Mandate, filed June 17, 1964

The State Board of Education and the Superintendent of Public Instruction of the Commonwealth of Virginia have advised the Court in writing that they are prepared to cooperate to the fullest extent with the County School Board of Prince Edward County and the Division Superintendent of Schools of Prince Edward County in regard to the opening of public schools in said county beginning with the Fall Term, 1964, and are prepared to offer every service and assistance made available by them to any other locality in the Commonwealth, and that they have done and intend to do everything within their power to make available to the school and County Officials of Prince Edward County all State funds that are available to said County for public school purposes.

The County School Board of Prince Edward County and the Division Superintendent of Schools of said County have advised the Couny in writing that they have made tentative preparations for the opening and maintenance of public schools on a non-discriminatory basis beginning with the Fall Term, 1964, and that final preparations for the opening and maintenance of said schools will be completed as soon as they are advised by the Board of Supervisors of Prince Edward County and the State Board of Education and Superintendent of Public Instruction that the necessary funds have been appropriated for public school purposes.

The Board of Supervisors of Prince Edward County failed to advise the Court as directed on June 5, 1964, whether they have appropriated or intend to appropriate such funds as are reasonably necessary for the opening and maintenance of the public schools of Prince Edward County for

the school year beginning with the Fall Term, 1964. Instead, counsel for the Board of Supervisors advised the Court that no funds had been appropriated and that the Board of Supervisors does not intend to make such appropriation prior to the meeting scheduled with the Court on June 17, 1964. Counsel further advised the Court that the Board of Supervisors has held no formal meetings since the issuance of the mandate of the Supreme Court of the United States in the above-styled matter, and that the individual members of the Board of Supervisors, in order to reach a determination of the course of action which the Board should follow, requested advice from the Court with respect to numerous matters including a determination by the Court of the penalties which they (members of the Board of Supervisors) may expect to suffer in the event they find it impossible to comply with the requirements of the order of this Court.

Such prejudgment, being improper, is refused.

It appearing to the Court from the foregoing statements and from the hearing this day held that the State Board of Education, the Superintendent of Public Instruction, the County School Board of Prince Edward County, and the Division Superintendent of said County intend to fully comply with the mandate of the Supreme Court of the United States in re the opening of the public schools in Prince Edward County, Virginia, and that the Board of Supervisors of Prince Edward County, Virginia, does not intend to appropriate such County funds as are reasonably necessary for the opening and maintenance of the public schools in Prince Edward County on a non-discriminatory basis for the school year beginning with the Fall Term, 1964.

This Court, pursuant to the mandate of the Supreme Court of the United States, does hereby ORDER and DIRECT the members of the Board of Supervisors of Prince

Edward County, Virginia, acting as such, on or before June 25, 1964, to appropriate such County funds as are reasonably necessary for the opening and maintenance of the public schools of Prince Edward County on a non-discriminatory basis beginning with the Fall Term, 1964; and if necessary to so do, the said members of the Board of Supervisors of Prince Edward County, acting as such, are directed to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination, the public school system in Prince Edward County like that operated in other counties in Virginia.

The injunction entered herein on November 16, 1961, and further extended on March 26, 1962, is herewith extended so long as the public schools of Prince Edward County, Virginia, remain closed.

The School Board of Prince Edward County, Virginia, and its Division Superintendent are directed to proceed with the preparation of the plans for the opening of the public schools in Prince Edward County on a non-discriminatory basis beginning with the Fall Term, 1964, and to complete the same upon notification of the appropriation of funds for public school purposes. The duty of opening and maintaining the public schools of Prince Edward County, including the admission of all eligible pupils on a non-discriminatory basis, rests with the School Board of Prince Edward County, its Division Superintendent, the State Board of Education, and the Superintendent of Public Instruction of the Commonwealth of Virginia. The education afforded by the public schools of Prince Edward County should be substantially equal to that afforded by public schools in other parts of Virginia.

The Court denies the request for the entry of an order restraining the County School Board of Prince Edward County from employing teachers, principals and other supporting personnel on a non-discriminatory basis on the

ground the subject matter is clearly beyond the scope of the pleadings in this case.

Upon the assurances of the State Board of Education and the Superintendent of Public Instruction that they fully intend to cooperate in the reopening of the public schools in Prince Edward County, Virginia, and that they intend to do everything within their power to make available to the school and County officials of Prince Edward County all State funds that are available to said County for public school purposes, the request for an order enjoining the said State Board of Education and its Superintendent of Public Instruction from approving vouchers or warrants for the payment of money from State funds for various public school purposes to other counties and cities in the Commonwealth until the operation of public schools in Prince Edward County has been resumed will be denied.

Orders affecting other counties and cities of the Commonwealth will be deferred until such time as the Court is satisfied they are necessary to guarantee the reopening of the public schools in Prince Edward County in accordance with the mandate of the Supreme Court of the United States.

The Clerk is directed to furnish, and the United States Marshall is directed to serve, an attested copy of this order upon the members of the State Board of Education, the Board of Supervisors of Prince Edward County, Virginia, the County School Board of Prince Edward County, Virginia, and the other named defendants.

VII

Motion to Alter or Amend Judgment, filed June 29, 1964

Plaintiffs move the Court to alter or amend its judgment order entered herein on June 17, 1964, in the following particulars:

1. That the defendants be permanently enjoined and restrained from processing or approving any applications from persons residing in Prince Edward County for state or county scholarships for use in any school that discriminates in the admission and education of pupils on the basis of race and from paying or causing the payment of such scholarships to any such person for use at any such school.

2. That the defendants The County School Board of Prince Edward County and T. J. McIlwaine as Division Superintendent of Schools for said county and his successors in office be enjoined and restrained from employing or assigning teachers or other administrative and supporting personnel on a basis of race or color.

3. That the members of the County Board of Supervisors of Prince Edward County, acting as such, be ordered and directed forthwith to appropriate such county funds as are reasonably necessary for the opening and maintaining of the public schools of Prince Edward County for all of the children of said county of public school age on a racially nondiscriminatory basis.

/s/ HENRY L. MARSH, III
Of Counsel for Plaintiffs

VIII

Prayers of Motion for Further Relief, filed July 7, 1964

Plaintiffs move the Court to grant them further, necessary and proper relief and, in support of their motion say:

(A) That the defendant Board of Supervisors of Prince Edward County be enjoined and restrained from failing and refusing to appropriate from county funds and to make available to the County School Board of Prince Edward County a sum of money, to be expended for public school purposes, not less than $392,594.00 for the efficient mainte-

nance and operation of public schools of said county for the education of all of the children of school age in said county during the fiscal year 1964-65;

(B) That the defendant County School Board of Prince Edward County be enjoined and restrained from failing and refusing to operate schools sufficient for the education of all of the children of school age residing in said county during the 1964-65 school session without racial discrimination; and

(C) That the defendants the Board of Supervisors of Prince Edward County, Virginia N. Dearing as Treasurer of Prince Edward County, the State Board of Education, and Woodrow W. Wilkerson as Superintendent of Public Instruction, be enjoined and restrained from processing or approving any applications for state or county scholarships for the education of any child eligible to attend the public schools of Prince Edward County.

(D) That this cause be retained on the docket for such other relief as to the Court seems meet.

S. W. TUCKER
Of Counsel for the Plaintiffs

IX

Response to Motion to Alter and Amend Judgment and Report of the Board of Supervisors of Prince Edward County

The Board of Supervisors of Prince Edward County in response to the motion of the Plaintiffs that the Court alter and amend its judgment rendered herein on June 17, 1964, says:

1. The injunction prayed for in Paragraph 1 of the motion to alter and amend the judgment of the Court is the identical

injunction which the plaintiffs sought in the amended supplemental complaint heretofore filed in this Court.

The Court refused to grant the injunction as sought but granted an injunction restraining the payment of tuition grants to persons residing in Prince Edward County so long as public schools remain closed. The plaintiffs appealed this action of the Court in denying their prayer for the injunction here sought to the Court of Appeals. That Court likewise denied the injunction here sought. On certiorari to the Supreme Court of the United States error was again charged for failure of the lower court to grant this broad injunction. The Justice Department of the United States, speaking through the Solicitor General as amicus curiae, took the position that the Court should not authorize the issuance of the broad injunction here demanded but that the Court should limit the injunction of tuition grants only to such time as public schools remain closed in accordance with action of this Court in its final decree which was the subject of the appeal. The Supreme Court of the United States in its opinion and mandate did not authorize this Court to enter the injunction here prayed for but said: "The injunction against paying tuition grants and giving tax credits while public schools remain closed is appropriate and necessary since these grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia."

Since the question here raised was specifically before the Supreme Court in this very case between the identical parties and that Court refused to authorize an injunction against the tuition grants except "while public schools remain closed," it is submitted that this Court has exercised its full power in this respect when it limits its injunction against tuition grants as directed by the Supreme Court of the

United States. It is further submitted that the plainiffs having already litigated this question to a final judgment in the Supreme Court of the United States are bound thereby.

It is further submitted that the injunction here prayed for may not be granted in this suit because the constitutional freedom of parents and children would be denied without due process of law since parents and children nor any of them are before the Court in this case and their rights may not be thus impaired without full opportunity for a hearing.

2. The injunction prayed for under Paragraph 2 of the Motion may not be granted because neither the pleadings nor the evidence support the injunction nor is there before the Court in this case any person who asserts that he is denied any constitutional right with respect to employment in the public school system. The jurisdiction of the Court in this case is invoked for the redress of rights secured under the Constitution of the United States and the Court therefor does not have jurisdiction to grant this injunction under the pleadings and proof in the case.

3. The plaintiffs ask under Paragraph 3 that the Board of Supervisors of Prince Edward County be directed to appropriate funds for the operation of public schools for *all* of the children of Prince Edward County on a racially nondiscriminatory basis.

The Supreme Court of the United States directed and this Court in compliance therewith ordered the Board of Supervisors of Prince Edward County "to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." We do not understand that language to require that public schools be operated and maintained for children who do not attend public schools. Such a public school system certainly is not "like that

operated in other counties in Virginia." Such an order would be arbitrary and unreasonable exercise of power in violation of equitable principles and without benefit to any person whomsoever, and would extend beyond the authority and direction of the mandate of the Supreme Court of the United States in this case.

Report of the Board of Supervisors of its Action in Response to the Order entered on June 17, 1964

The Board of Supervisors of Prince Edward County in further response to Paragraph 3 of the motion to alter and amend the judgment of the Court reports its action under the order of this Court entered on June 17, 1964, as follows:

On June 23, 1964, this Board met in regular and public session and adopted two resolutions, levying taxes and appropriating funds derived therefrom to the School Board of Prince Edward County to be expended as directed in the said order. Certified copies of the resolutions aforesaid are attached hereto and are made a part hereof by reference. The Board of Supervisors of Prince Edward County asserts to the Court that it has acted in good faith in compliance with the order of the Court to provide local funds reasonable and adequate for the operation of public schools in Prince Edward County for all of the children who may be expected to attend said schools on a racially nondiscriminatory basis during the 1964-65 school year. The funds thus made available to the School Board of Prince Edward County are as follows:

Proceeds of County Levy and Appropriation	$189,000
Surplus in School Board Account	18,000
Misc. Income to the School Board	11,000
Basic State Aid	159,000
Special State Funds	41,200
Total Funds Certain	$418,200

The average cost of public education for the State of Virginia as a whole per pupil in average daily attendance for the year 1962-63 (the last year for which figures are available) was $312.40. The total funds available to the School Board of Prince Edward County results in an expenditure per pupil in average daily attendance of $288.41. The Board of Supervisors of Prince Edward County believes that this comparison demonstrates that it has made a reasonable and adequate appropriation to the School Board for the operation and maintenance of public schools for the year 1964-65. The appropriation made by the Board of Supervisors from local funds results in an expenditure per pupil in daily attendance from local funds of $131.00. If the entire anticipated enrollment of 1600 pupils is taken as the index for the per pupil expenditure of local funds, the figure is $118.00. There are seven counties comprising separate school divisions adjacent to Prince Edward County. The expenditure of local funds per pupil in average daily attendance for each of these counties during the year 1962-63 (the last year for which figures are available) was as follows:

Amelia	$ 92.00
Appomattox	121.00
Buckingham	83.00
Charlotte	84.00
Cumberland	68.00
Lunenburg	83.00
Nottoway	104.00

It is therefore respectfully submitted that the appropriation made by the Board of Supervisors in compliance with order of this Court entered on June 17, 1964, is reasonable and "adequate to reopen, operate, and maintain without

racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia."

X

Order of District Court, filed July 9, 1964

This cause came on again this 9th day of July, 1964, to be heard upon the plaintiffs' motion to alter or amend the order entered herein on June 17, 1964; upon the response of the defendants; upon the plaintiffs' motion for an order enjoining and restraining the payment of State and County tuition grants for the 1963-64 school year; and argument of counsel.

It appearing to the Court that the defendants have announced the opening of the public schools effective September 8, 1964; that appropriations have been made for the maintenance and operation thereof and that the State and County school officials are proceeding with the taking of a school census and the completing of the necessary prerequisites incident to the opening of the public schools of Prince Edward County on a non-discriminatory basis, there is no justification for altering or amending its order of June 17, 1964. To do so would only hinder and delay the opening of the public schools of Prince Edward County.

Therefore, Paragraph No. 1 of plaintiffs' motion to alter or amend the judgment entered herein on June 17, 1964, is denied upon the ground the Supreme Court of the United States has not so ordered.

Paragraph No. 2 is denied upon the ground the subject matter is clearly beyond the scope of the pleadings in this case.

The order of June 17, 1964, clearly requires the admission of all eligible pupils on a non-discriminatory basis and

further amendment as requested in Paragraph No. 3 of the motion to alter or amend is denied.

Judge J. Spencer Bell of the United States Court of Appeals for the Fourth Circuit entered an order enjoining the defendants, pending an appeal, from processing or paying County and State tuition grants until the matter was heard in the District Court.

Said hearing having been held this day, and the defendants consenting to the entry of a permanent restraining order as requested;

The defendants, their agents, employees, successors in office, and all other persons acting for them, are herewith permanently enjoined and restrained from processing, approving or paying any County or State tuition grants to any person residing in Prince Edward County, Virginia, for the 1963-64 school year.

The plaintiffs this day tendered a motion for further relief, praying that the Board of Supervisors be required to appropriate not less than $392,594.00 for the maintenance and operation of the public schools of Prince Edward County; that the County School Board be required to operate schools sufficient for the education of all children of school age residing in the County; and that the defendants be enjoined from processing or approving any applications for State and County scholarships for the education of any child eligible to attend the public schools of Prince Edward County, Virginia.

The motion was marked "Filed" and denied without prejudice to the right of the plaintiffs to renew as to prayers A and B thereof after the opening of the public schools, if they be so advised, and without prejudice to instituting an appropriate suit as to prayer C, if they be so advised.

It is the duty of the members of the Board of Supervisors to appropriate such County funds as are reasonably neces-

sary to reopen, operate and maintain without racial discrimination, the public school system in Prince Edward County, Virginia, like that operated in other counties of Virginia. The duty of opening and maintaining the public schools of Prince Edward County, including the admission of all eligible pupils on a non-discriminatory basis, rests with the State and County school officials. The education offered should be substantially equal to that offered by public schools in other parts of Virginia.

This Court presumes the State and County officials involved will fully and completely perform their respective duties. It will not prejudge or hear motions alleging noncompliance with its orders except for good cause shown.

/s/ OREN R. LEWIS
United States District Judge

At Alexandria
July 9, 1964

XI

Notice of Appeal, filed July 17, 1964

Notice is hereby given that Cocheyse J. Griffin, Mignon D. Griffin, Naja D. Griffin, and L. Francis Griffin, Jr., infants, by and through L. Francis Griffin, their father and next friend, and all other of the plaintiffs in this case,

Hereby appeal to the United States Court of Appeals for the Fourth Circuit from so much of the order of this court entered July 9, 1964, as denies the relief sought by plaintiffs in their motion to alter or amend this court's judgment order of June 17, 1964, and in their motion for further relief filed on July 7, 1964, such relief as sought by the plaintiffs and denied by the court having been:

(1) An order restraining the defendants from processing or approving any applications for state or county scholar-

ships for the education of any child eligible to attend the public schools of Prince Edward County,

(2) An order restraining the defendants from processing or approving any applications from persons residing in Prince Edward County for state or county scholarships for use in any school which discriminates in the admission and education of pupils on the basis of race.

(3) An order directing the County Board of Supervisors to appropriate from county funds and make available to the County School Board a sum of money to be expended for public school purposes, not less than $392,544.00, for the efficient maintenance and operation of public schools for the education of all of the children of school age in said county during the fiscal year 1964-65,

(4) An order restraining the County School Board from failing to operate schools sufficient for the education of all of the children of school age residing in said county during the 1964-65 school session without racial discrimination, and

(5) An order restraining the County School Board and Division Superintendent from employing or assigning teachers or other administrative and supporting personnel on a basis of race or color.

S. W. TUCKER
Of Counsel for Plaintiffs

XII

Resolution of the Board of Supervisors of August 5, 1964

Whereas, by Ordinance of the Board of Supervisors of Prince Edward County, duly adopted at its regular meeting, July, 1960, in pursuance of Section 22-115.37 the Board of Supervisors was authorized to pay grants of $100.00 for each

child qualifying under the provisions of said Ordinance, such amount which might be increased by resolution of this Board adopted on or before the end of any fiscal year, and;

Whereas, in the opinion of this Board, such amount should be increased for the fiscal year 1964-65, now therefore;

On motion of Mr. Pickett, seconded by Mr. Steck, and unanimously carried, Be It Resolved that educational grants under the aforesaid ordinance be increased for all children meeting the qualifications as set forth in the aforesaid ordinance to $310.00 for each child attending a private non-sectarian high school (Grades 8-12) or a public high school, located outside the County of Prince Edward and $290.00 for each child attending a private non-sectarian elementary school (Grades 1-7) or a public elementary school, located outside the county, provided further that applications for such grants shall properly be made to the agent of the Board, and approved by this Board.

Be It Further Resolved, that such grants shall be paid one-half on or before September 1, 1964, and one-half on or before January 1, 1965.

XIII

Motion to Accelerate Appeal

Appellants move that this appeal be advanced on the docket and heard at a special session during which this Court will enter or direct the entry of such orders as will insure compliance with the Supreme Court's admonition in this case that quick and effective relief be fashioned to require the operation of a racially non-discriminatory public school system in Prince Edward County, Virginia.

Notwithstanding the objections and contentions of the plaintiffs as made in the District Court, the County Board of

Supervisors of Prince Edward County (the intransigence of which has been demonstrated beyond peradventure) is permitted to make its own arbitrary determination of the amount it will appropriate for public schools for the 1964-65 session. In the meantime, public authorities are free to pay public funds for scholarship grants to or for benefit of white children virtually all of whom will attend the racially exclusive schools of the Prince Edward Educational Foundation. The amount which the Board of Supervisors has appropriated for public schools is patently inappropriate for the efficient operation of public schools for the Negro children of the county alone.

Unless prompt action will be taken by this Court, thirteen years of litigation in which the plaintiffs have sought desegregation of public schools and five years of closed public schools will have been but a prelude to the establishment of two separate systems of schools maintained at public expense, the favored one of which will be for white children only and the other one of which will be an inadequately financed system attended only by Negroes and by such few, if any, white children who and whose parents may withstand the dissuading community pressure and publicly financed inducements to conform to the pattern of racially segregated public education to which the County Board of Supervisors continues to be committed.

On July 17, 1964, appellants filed their Notice of Appeal. Simultaneously with service of this motion, appellants serve designation of the record on appeal and designation of the parts of the record they propose to print.

S. W. TUCKER
Of Counsel for Appellants

XIV

Motion to Cite for Contempt

1. In accordance with the specific direction of this Court in this case, *sub nom, Allen* v. *County School Board of Prince Edward County,* 266 F.2d 507 (4th Cir. May 5, 1959), the United States District Court for the Eastern District of Virginia did, on April 22, 1960, ADJUDGE, ORDER and DECREE as follows:

> "That the defendants, the County School Board of Prince Edward County, T. J. McIlwaine, Division Superintendent of Schools of Prince Edward County, their agents and employees and successors in office, and all persons acting in concert with them, be, and they hereby are, restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.
>
> "That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this end at the earliest practical day."

2. "Having as early as 1956 resolved that they would not operate public schools 'wherein white and colored children are taught together' the [Board of] Supervisors of Prince Edward County refused to levy any school taxes for the 1959-1960 school year, explaining that they were 'confronted with a Court decree which required the admission of white and colored children to all the schools of the county without regard to race or color.' As a result, the county's public schools did not reopen in the fall of 1959 and have

remained closed ever since, although the public schools of every other county in Virginia have continued to operate under laws governing the State's public school system and to draw funds provided by the State for that purpose." (*Griffin* v. *County School Board of Prince Edward County, et al.*, . . . U.S. . . . , May 25, 1964.)

3. Pursuant to the Supreme Court's May 25, 1964, opinion in and remand of this case, the District Court by order entered June 17, 1964 did "ORDER and DIRECT the members of the Board of Supervisors of Prince Edward County, acting as such, on or before June 25, 1964, to appropriate such county funds as are reasonably necessary for the opening and maintenance of the public schools of Prince Edward County on a non-discriminatory basis beginning with the Fall Term, 1964."

4. On July 17, 1964, the plaintiffs served and filed notice of their appeal to the United States Court of Appeals for the Fourth Circuit from so much of the order of the District Court entered July 9, 1964, as denies relief sought by the plaintiffs, including

(a) "An order restraining the defendants from processing or approving any applications for state or county scholarships for the education of any child eligible to attend the public schools of Prince Edward County,"

(b) "An order restraining the defendants from processing or approving any applications from persons residing in Prince Edward County for state or county scholarships for use in any school which discriminates in the admission and education of pupils on the basis of race," and

(c) "An order directing the County Board of Supervisors to appropriate from county funds and make available to the County School Board a sum of money to be expended for

public school purposes, not less than $392,544.00, for the efficient maintenance and operation of public schools for the education of all of the children of school age in said county during the fiscal year 1964-65."

5. On July 28, 1964, the plaintiffs served and filed their Motion to Accelerate Appeal wherein it is suggested "Unless prompt action will be taken by this Court, thirteen years of litigation in which the plaintiffs have sought desegregation of public schools and five years of closed public schools will have been but a prelude to the establishment of two separate systems of schools maintained at public expense, the favored one of which will be for white children only and the other one of which will be an inadequately financed system attended only by Negroes and by such few, if any, white children who and whose parents may withstand the dissuading community pressure and publicly financed inducements to conform to the pattern of racially segregated public education to which the County Board of Supervisors continues to be committed."

6. On August 4, 1964, this Court acting through its Clerk sought to obtain a stipulation that the defendants would not pay or cause payment of scholarship grants to persons residing in Prince Edward County until the issues raised by the appeal had been decided. Plaintiffs believe and allege that the Board of Supervisors of Prince Edward County and the members thereof had knowledge of the efforts to obtain such stipulation at the time they took the action next related.

7. At a special meeting held on the night of August 4, 1964, the Board of Supervisors of Prince Edward County decided to pay scholarship grants to parents of white children of elementary and high school grades residing in Prince Edward County, in sums aggregating approximately $180,-

000.00, and then the Board caused notice of such action to be given to the white parents who accordingly made applications for such grants; and such applications being forthwith processed, individual checks to said parents were written and delivered before 9:00 o'clock A.M. on August 5, 1964, with the result that checks for the major portion of said sum of $180,000.00 had been cashed before any of the Negro citizens of Prince Edward County had knowledge or means of knowledge that the August 4 meeting of the Board of Supervisors had occurred.

8. The calculated result of the August 4, 1964, action of the Board of Supervisors is that the parents who thus received public funds as scholarship grants will, under threat of criminal prosecution, pay such funds to the Prince Edward Educational Foundation, a corporation operating elementary and high schools in Prince Edward County for white children only.

9. Coupled with its earlier action of appropriating the grossly inadequate sum of $189,000.00 as the county's share for operation of public schools for 1600 Negro children while appropriating $375,000.00 for elementary and secondary education of 1300 white children in private nonsectarian schools, a further calculated result of the August 4, 1964, action of the Board of Supervisors is that the white children of the county with negligible exceptions will continue to attend the racially exclusive schools of the Prince Edward Educational Foundation at public expense.

10. The said action of the Board of Supervisors taken on August 4, 1964, was action calculated to continue the separation of the white and colored children in schools maintained and supported by money raised by public taxation and was in contempt of this Court's 1959 mandate that the District

Judge issue an order enjoining action that regulates or affects on the basis of color the public school education of Negro children, and thus constituted an obstruction to the administration of justice.

11. The said action of the Board of Supervisors taken on August 4, 1964, was action calculated to frustrate the exercise of the jurisdiction of this Court by placing the subject matter of the litigation beyond the reach of the Court before the plaintiffs' appeal could be heard and determined.

12. The said action of the Board of Supervisors taken on August 4, 1964, was action taken under color of law to willfully subject the plaintiffs and the class they represent to the deprivation of rights secured by the Constitution of the United States, in violation of 18 USC §242.

13. W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck, and H. E. Carwile, Jr., presently constitute the defendant Board of Supervisors of Prince Edward County, Virginia.

WHEREFORE: Plaintiffs move that a rule issue requiring W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., as the members of the defendant Board of Supervisors of Prince Edward County, Virginia, to appear before this Court at a time and place therein to be stated and to show cause, if any they can, why they should not be adjudged in contempt and punished therefor and why they should not be compelled to institute and prosecute proceedings against the Prince Edward Educational Foundation to recover from it so much of the money disbursed pursuant to the Board of Supervisors' action of August 4, 1964, as can be shown to have been paid to said Foundation or which may hereafter be paid to said Foundation, and to do and perform such other things for

the restoration of the subject matter and the protection of the rights of the plaintiffs as the Court may determine.

S. W. TUCKER
Of Counsel for Plaintiffs

XV

Reply of Members of the Board of Supervisors of Prince Edward County, Virginia, to a Motion to Cite for Contempt

The members of the Board of Supervisors of Prince Edward County respectfully state to the court as follows:

1. They have acted in good faith and with appropriate respect for the Constitution of the United States, for the Federal Courts, and for all others in authority.

2. At no time have they taken any action which they have understood to be in violation of any order of any court or to be in contempt of the jurisdiction of any court in this case.

3. It is true that they refused to levy taxes upon the people of Prince Edward County for the operation of public schools during the years 1959-60, 1960-61, 1961-62, 1962-63 and 1963-64.

4. The legal basis upon which their action was predicated was considered in the District Court, in this court, and in the Supreme Court of the United States. Neither the District Court nor this court entered any order or rendered any opinion holding that the Board of Supervisors of Prince Edward County were required to levy taxes for the operation of public schools. The Supreme Court of Appeals of Virginia affirmatively held that they did have such a right under the law of Virginia, and that the failure to levy such taxes did not violate the Constitution of the United States.

5. On May 25, 1964 the Supreme Court of the United States held that under the Constitution of the United States the public schools of Prince Edward County could not be closed while public schools were operated in other counties and cities in Virginia and by its mandate directed the Judge of the District Court to require this Board to appropriate such county funds "as are reasonably necessary for the opening and maintenance of public schools of Prince Edward County on a non-discriminatory basis beginning with the fall term 1964."

6. On June 17, 1964 the District Court entered such an order and on June 23, 1964 this Board made a tax levy in accordance with said order and appropriated the proceeds thereof, $189,000.00, to the School Board for the operation of public schools in accordance with the order of the Court.

7. At the time the appropriation was made it was wholly uncertain as to how many children would attend the public schools of Prince Edward County. This Board believed the amount appropriated was reasonable and sufficient to operate the public schools in accordance with the requirement of the laws of the State of Virginia and in accordance with the requirement of the order entered in the District Court on June 17, 1964.

8. By affidavit filed by the Superintendent of Schools of Prince Edward County it now appears that an additional sum of $66,747.00 may be required for the operation of the said schools for the entire school term. It is the intention of the Board of Supervisors of Prince Edward County to provide those funds in event they are not forthcoming from some other source, and in all events it is the intention of this Board to do what is reasonable and appropriate to fulfill the obligations imposed upon it in the order of the United States District Court of June 17, 1964.

9. This Board has appropriated during each year beginning with the year 1959-60 a sum of money for the payment of scholarships for the education of children resident of Prince Edward County and the appropriation of $375,000.00 for that purpose on June 23, 1964 was simply a reappropriation of the identical sum which was appropriated for that purpose the previous year.

10. The money appropriated for scholarships is the proceeds of taxes which had been levied for that purpose only and not for public schools.

11. On August 4, 1964 this Board was requested by its Special Counsel to stipulate that it would make no payments for scholarships for the education of children residing in Prince Edward County in non-sectarian private schools until this appeal was decided. The Board refused to make such a stipulation for the reason that it would be wholly misunderstood by the people of the county. This Board is advised that those who had contacted Special Counsel of the Board were advised of the refusal of the Board to so stipulate.

12. On the morning of August 5, 1964 the Board of Supervisors met and adopted a resolution that checks in payment of the amount of money authorized by the said resolution and in pursuance of a County Ordinance, a copy of which is found, were issued, the total thereof being approximately $178,000.00.

13. That at the time this action was taken this Board was of the opinion that the action was authorized by the decision of the Supreme Court of the United States and under the order of June 17, 1964, since all action had been taken by all agencies responsible to open, maintain and operate the public schools in Prince Edward County.

14. This Board was further advised that it was under no order which prevented it from taking the action above referred to and it disavows any intention on its part to be disrespectful or to disregard any court or its jurisdiction, and was of the opinion that the action taken was within its lawful right.

15. This Board further states that the amount paid under the resolution aforesaid was $145.00 for elementary children and $155.00 for high school children. When it was brought to the attention of this Board that the amount of money authorized by the resolution, when added to the amount which might be available to parents under the State law, might exceed the amount of the actual cost of education, although this Board is of the opinion that both the county ordinance and the State law forbid a parent to apply for or to receive a sum in excess of the amount actually paid for the education of the child, it, nonetheless, adopted a resolution modifying and amending its former resolution so as to guarantee the fact that no parent would receive a sum of money in excess of the actual cost of education of the child.

The members of this Board aver their good faith and deny that they have acted in violation of any order of this Court and pray that the motion to cite them for contempt be dismissed.

XVI

District Court Order of May 17, 1965

"ORDER ON FINDINGS

"This cause came on again the 23rd day of April, 1965 for further inquiry into the facts surrounding the (tuition grant) payments made August 4-5, 1964; for hearing upon the order entered February 8, 1965 directing that W. W. Vaughan, C. W. Gates, H. M.

Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., show cause, if any they could, why they should not be held in contempt of this Court for failure to comply with its order entered herein on the 9th day of July, 1964; and for hearing upon plaintiffs' motion for an award of counsel fees.

"All motions were consolidated for hearing.

"The members of the Board of Supervisors appeared in person and by counsel. All parties in interest were fully heard and given the opportunity of presenting such evidence and introducing such exhibits as they deemed pertinent to the motions under consideration.

"From the testimony and exhibits thus produced the Court finds that:

"The appellants filed a motion to accelerate their appeal (in re the payment of these tuition grants) to the Fourth Circuit on or about July 28, 1964.

"Mr. Frederick T. Gray, of counsel for the Superintendent of Public Instruction of Virginia, chanced to see Maurice Dean, Clerk of the United States Court of Appeals for the Fourth Circuit, at or near Tenth and Main Streets in Richmond on or about July 31, 1964, at which time Mr. Dean mentioned that Mr. Gray would very likely be back before the Court of Appeals since a motion to accelerate the appeal in the Prince Edward school case was in the offing.

"Shortly thereafter Mr. Dean told Mr. Gray that Chief Judge Haynsworth wanted to know whether or not it was possible to get a stipulation from the State and County authorities that the tuition grant payments would not be paid pending the hearing on the appeal.

"Mr. Gray immediately advised the Attorney General and counsel for the Board of Supervisors of this request. He was then informed that the Board of Supervisors would not agree to enter into the suggested stipulation. Mr. Dean was so told during the late evening of August 4, 1964.

"Mr. Dean again called Mr. Gray the following morning informing him that the stipulation desired was not that the tuition grants would not be paid until this case had been decided but rather that the grants would not be paid prior to the normal date for the processing and payment of the grants.

"While Mr. Gray was relaying this information to the Attorney General, he received a telephone call from the Commonwealth Attorney of Prince Edward County advising him that during the night of August 4, 1964 the Board of Supervisors had authorized the payment of the tuition grants and that the grants had in fact been made and actually paid to the citizens on the morning of August 5th. This took the State officials by complete surpise as there had been no discussion between the State and County officials concerning advancing the date for the payment of the grants.

"Mr. Gray then called Mr. Dean and told him the grants had been paid that morning.

"The Board of Supervisors of Prince Edward County held a meeting on the morning of August 4, 1964 at which time Warren Scott and four of the Negro citizens appeared and filed an unsigned petition bearing ten hundred four typewritten names requesting that the Board of Supervisors allocate additional funds to be used for the purpose of public education. No action was then taken.

"Shortly after adjournment of the Board meeting, Supervisor Jenkins and Supervisor Steck met with a Mr. Taylor and other interested citizens for the purpose of finding a way to pay the '64-'65 tuition grants prior to the time the Court of Appeals could enter an order staying these payments. (It was then known to Mr. Jenkins and to the other members of the group that there had been discussions between Mr. Gray and Mr. Dean in re the possibility of the County agreeing not

to make any tuition grant payments during the pendency of the appeal.)

"The Commonwealth Attorney and two other members of the Board of Supervisors were then called. Those assembled agreed that if the Board of Supervisors would increase the tuition grants to $310.00 for high school and $290.00 for elementary school and authorize the immediate payment thereof, this could be done before the Court of Appeals could do anything about it.

"The four Board members and the Commonwealth Attorney then went to the home of the chairman of the Board of Supervisors to advise him of what they had in mind and to determine whether or not a special meeting of the Board of Supervisors could be called the next morning for the purpose of expediting the payment of the '64-'65 tuition grants. The chairman, after being advised by the Board's special counsel and the Commonwealth Attorney that such a resolution on the part of the Board of Supervisors would be legal, called a special meeting of the Board for 8:00 a.m. August 5th. At that meeting the Board passed the resolution which provided that the grants should be paid half on or before September 1, 1964 and half on or before January 1, 1965.

"In the interim, that is, between the meeting at Chairman Vaughan's house and eight o'clock the next morning, Board Member Jenkins and other members of the citizens' committee made arrangements to telephone the parents of the children then attending the Prince Edward School Foundation schools advising them if they came down that night and made application they could get half the tuition money that morning.

"Some twenty or thirty volunteers assisted the secretary of the Board in processing the applications and making out the necessary checks. County bonds were sold in Richmond the next morning to raise the money necessary for the payment of these checks.

"Twelve hundred seventeen tuition grant applications were filed during the night of August 4-5. All of these applications were for the '64-'65 school year. Each applicant was paid one-half of the amount applied for. Most, if not all, of the applicants were children enrolled in the Prince Edward School Foundation schools for the year '64-'65.

"There being no evidence that the money thus paid covered school years prior to '64-'65, the Court concludes that the payments made August 4-5, 1964 were not violative of the order entered herein July 9, 1964 The show cause order issued against the members of the Board of Supervisors February 8, 1965 will be dismissed, and it is SO ORDERED.